

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

JOE ZEITCHICK,	)	3:06-CV-00138-ECR-VPC
	)	(Base Case)
Plaintiff,	)	3:06-CV-00642-ECR-VPC
	)	(Member Case)
vs.	)	
	)	<b><u>ORDER</u></b>
CAROL LUCEY and HELAINE JESSE,	)	
	)	
Defendants.	)	
	)	

On May 26, 2010, Defendants filed a motion in limine (#155) asking the Court to clarify the scope of the issues for trial. Pursuant to a subsequent Order (#168), the parties filed points and authorities (## 171 and 172) addressing the issue. The motion (#155) is granted, and we offer the following as clarification.

First, we note that the so-called "law of the case doctrine" informs our analysis of the issues Defendants seek to clarify. Under the "law of the case doctrine," courts do not "reexamine an issue previously decided by the same or higher court in the same case." Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 766 (9th Cir. 2001). A court may have discretion to depart from the law of the case and reexamine an issue where: (1) the first decision was clearly erroneous; (2) there has been an intervening change of law; (3) the evidence is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result. United States v. Alexander, 106

1 F.3d 874, 876 (9th Cir. 1997). A district court abuses its  
2 discretion when it departs from the law of the case without the  
3 presence of one of these five requisite conditions. Thomas v.  
4 Bible, 983 F.2d 152, 155 (9th Cir. 1993).

5 A. Denial of a Benefit

6 In his previous papers, Plaintiff has explicitly characterized  
7 the law governing his claims as follows: "Plaintiffs' claim is  
8 analyzed under the public employee First Amendment retaliation test  
9 because the claim alleges a denial of a benefit from the  
10 government." (P.'s Opp. at 25 (#86).) We have analyzed the  
11 dispositive motions in this case under that standard<sup>1</sup>. Plaintiff  
12 now, on the eve of trial, has reversed his earlier position,  
13 contending that the law relating to public employee First Amendment  
14 retaliation test is inapplicable because Plaintiff is not a public  
15 employee. (P.'s Points and Authorities at 5 (#171).) Instead,  
16 Plaintiff contends he need only prove that he was subject to an  
17 adverse action or action that were likely to deter his speech. (Id.  
18 at 6.)

19 Plaintiff is correct that he needs to show that Defendants'  
20 actions were reasonably likely to deter a person constitutionally  
21 protected speech. Coszalter v. City of Salem, 320 F.3d 968, 976

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23 <sup>1</sup> That standard also requires that the speech at issue to be  
24 protected. Plaintiff does not appear to challenge the requirement  
25 that the speech at issue be protected. Protected speech for the  
26 purposes of a First Amendment retaliation claim requires the speech  
27 to address an issue of public concern. At the summary judgment stage,  
28 Defendants argued that Plaintiff speech was not protected because it  
was false. We held that Plaintiff's speech was not false on its face,  
and thus Plaintiff's speech was protected for the purpose of surviving  
summary judgment. (Transcript of Proceedings at 36 (#102).) This  
Order does not address the protected status of Plaintiff's speech.

1 (9th Cir. 2003). This does not, however, mean that our previous  
2 decisions were "clearly erroneous." See Alexander, 106 F.3d at 876.  
3 Denial of a valuable government benefit is a species of actions that  
4 deter or chill speech. See Coszalter, 320 F.3d at 975; Nunez v.  
5 City of Los Angeles, 147 F.3d 867, 875 (9th. Cir. 1998). Although  
6 most of the case law regarding denial of a benefit derives from  
7 public employment cases, the general framework can be applied  
8 outside that context. See Perry v. Sindermann, 408 U.S. 593, 597  
9 (1972) (noting that the general principle – that the government may  
10 not deny a benefit to a person on a basis that infringes his  
11 constitutionally protected interests – has been applied to areas  
12 other than public employment).

13 Denial of a benefit jurisprudence thus was and can continue to  
14 be appropriately applied to Plaintiff's First Amendment retaliation  
15 claim. Plaintiff has consistently framed the issues in his case as  
16 involving the denial of a benefit and invoked the legal standards  
17 applicable to this species of First Amendment law. We will not now  
18 deviate from this framework.

19 B. The Benefit at Issue

20 Plaintiff attempts to characterize the "valuable government  
21 benefit" at issue as, inter alia, "contract discussions" and "making  
22 a contribution to society." (Joint Pretrial Order at 20 (#138).)  
23 We reject Plaintiffs' attempts to so characterize the benefit at  
24 issue.

25 On June 5, 2009, we issued an Order (#103) from the bench,  
26 stating in relevant part: "It appears, however, to be overreaching  
27 to say that merely ceasing negotiations with a private party is – or  
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1 make that, in rejecting a donation, is a denial of a valuable  
2 government benefit. We find that prohibition on revoking or  
3 breaching contracts is, however, violative of clearly established  
4 law, and is not barred by a qualified immunity defense. Whether the  
5 government may be liable for ceasing to negotiate likely is subject  
6 to qualified immunity<sup>2</sup>, however . . . the Plaintiffs must show that  
7 the college deprived them of an actual valuable government benefit  
8 such as a contractual right." (Transcript of Proceedings at 27  
9 (#102).)

10 Plaintiff contends that by using the term "such as," we implied  
11 that the benefit at issue was not limited to a "contractual right."  
12 (P.'s Points and Authorities at 14 (#171).) Plaintiff is correct  
13 that we did not explicitly rule out the possibility that Plaintiff's  
14 lawsuit could be based on retaliatory denial of a government benefit  
15 other than a contractual right. Nevertheless, Defendants, in their  
16 motion, sought summary judgment on all of the claims then-remaining  
17 in Plaintiff's lawsuit. In holding that only the prohibition on  
18 revoking of violating a contract was clearly established, we  
19 rejected the viability of alternative characterizations of the  
20 "benefit" at issue. Any additional alternative characterizations of  
21 the benefit at issue not then raised were waived by Plaintiff.  
22 Plaintiff will thus have to prove at trial that Defendants breached  
23 or revoked a contract with him in retaliation for his exercise of  
24 free speech.

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26 <sup>2</sup> The law is unclear as to whether negotiations constitute a  
27 valuable government benefit. For that reason, we granted Defendants  
28 qualified immunity to the extent Plaintiff's claim was based on the  
government's refusal to negotiate with Plaintiff.

1        C. Conspiracy and Coercion

2        In the "Facts" section of Plaintiff's original complaint, he  
3 alleges that Defendants conspired "to punish" Plaintiff and to  
4 "conceal their violation." (Compl. ¶ 11 (#3).) He also alleged  
5 that former defendant Rollings "coerced" him into making favorable  
6 comments about the college. (Id. ¶ 10.) Nevertheless, Plaintiff  
7 did not frame his complaint such that coercion and conspiracy were  
8 independent causes of action. Defendants' motion (#39) to dismiss  
9 and motion (#79) for summary judgment addressed all of Plaintiff's  
10 claims. Defendants apparently assumed that coercion and conspiracy  
11 were not independent claims for relief. Plaintiff did not attempt,  
12 in opposing these motions, to disabuse Defendants of this notion.  
13 Plaintiff now argues that because Defendants left the Plaintiff's  
14 allegations of coercion and conspiracy "uncontested," they are still  
15 "triable," presumably as independent causes of actions. (See P.'s  
16 Points and Authority at 16 (#171).) It is inappropriate to frame  
17 factual allegation as an independent causes of action in order to  
18 manufacture new claims for relief on the eve of trial. We reject  
19 Plaintiff's attempt to do so. The only claim for relief in this  
20 case is a claim for First Amendment Retaliation.

21        D. Damages

22        Any damages for this case must flow from the constitutional  
23 violation itself. See Carey v. Piphus, 435 U.S. 247, 254 (1978) (A  
24 fundamental aim of section 1983 is "to compensate persons for  
25 injuries caused by the deprivation of constitutional rights.").  
26 Plaintiff admits that "the diminished property value of the subject  
27 property caused by the chiller had taken place before he purchased  
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1 the property.” (P.’s Points and Authority at 19 (#171).)  
2 Therefore, diminution in value is not an appropriate damage in this  
3 case.

4 E. Whether the Chiller Noise Impacted Plaintiff’s Quiet  
5 Enjoyment

6 Defendants seek clarification as to whether the impact of the  
7 chiller noise on Plaintiff’s “quiet enjoyment” is an appropriate  
8 issue in this case. The term “quiet enjoyment” is a legal term of  
9 art: “The purpose of the covenant of quiet enjoyment is to secure  
10 tenants against the acts or hindrances of landlords. Therefore, to  
11 prove a sufficient issue for breach of the covenant of quiet  
12 enjoyment, the tenant need only provide evidence demonstrating  
13 constructive eviction; actual eviction is not required.” Winchell  
14 v. Schiff, 193 P.3d 946 (Nev. 2008). This case does not involve a  
15 dispute between a landlord and a tenant. Moreover, as stated above,  
16 the only remaining claim left in this case is for First Amendment  
17 retaliation. A claim for “quiet enjoyment” therefore cannot be  
18 appropriately asserted in this case.

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20 IT IS, THEREFORE, HEREBY ORDERED Defendants’ motion in limine  
21 seeking clarification (#155) is GRANTED. We provide the following  
22 by way of clarification: There is one claim remaining in this case –  
23 First Amendment Retaliation. Pursuant to our Order (#102), to  
24 succeed on this claim, Plaintiff must prove that Defendants revoked  
25 or breached a contract in retaliation for Plaintiff exercising his  
26 First Amendment rights. Any damages must flow from the

1 constitutional violation itself. Diminution in value of the subject  
2 property is not an appropriate damage in this case.

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4 DATED: June 10, 2010.

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UNITED STATES DISTRICT JUDGE

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